2016-1882

# United States Court of Appeals
for the
Federal Circuit

ADJUSTACAM, LLC,
Plaintiff-Appellee,
v.

NEWEGG INC., NEWEGG.COM, INC., & ROSEWILL, INC.,
Defendants-Appellants,
&

SAKAR INTERNATIONAL, INC.,
Defendant.

Appeals from the United States District Court for the Eastern District of Texas in Case No. 6:10-CV-329-JRG, Judge Rodney Gilstrap

NON-CONFIDENTIAL REPLY BRIEF OF DEFENDANTS-APPELLANTS NEWEGG INC., NEWEGG.COM, INC., & ROSEWILL, INC.

Kent E. Baldauf, Jr.
Daniel H. Brean
Bryan P. Clark
THE WEBB LAW FIRM
One Gateway Center
420 Fort Duquesne Blvd., Suite 1200
Pittsburgh, PA 15222
Telephone: (412) 471-8815

Richard G. Frenkel
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
Telephone: (650) 463-3080

Mark A. Lemley
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666

Counsel for Defendants-Appellants Newegg, Inc., Newegg.com, Inc., and Rosewill, Inc.

September 2, 2016

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AdjustaCam v. Newegg, 2016-1882

CERTIFICATE OF INTEREST

Counsel for Newegg Inc. hereby certifies the following:

1. The full name of every party or amicus represented by me is:

Newegg Inc.; Newegg.com, Inc.; Rosewill, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

No publicly held company owns ten percent or more stock in Newegg Inc.; Newegg.com, Inc.; or Rosewill, Inc. Newegg Inc. has no parent corporation. Prior to the dissolution of Newegg.com Inc., Newegg Inc. was the parent company of Newegg.com Inc. Rosewill Inc. is a wholly owned subsidiary of Magnell Associate Inc., which is a wholly-owned subsidiary of Newegg North America Inc., which is wholly owned by Newegg Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Kent E. Baldauf, Jr., The Webb Law Firm
Daniel H. Brean, The Webb Law Firm
Herbert A Yarbrough, III, Yarbrough & Wilcox, PLLC
Debra Elaine Gunter, Yarbrough Wilcox, PLLC
John N. Zarian, Parsons Behle & Latimer
Robert A. Matson, Parsons Behle & Latimer
Justin Neil Stewart, Parsons Behle & Latimer

Dana M. Herberholz, Parsons Behle & Latimer
Christopher Cuneo, Parsons Behle & Latimer
Richard G. Frenkel, Latham & Watkins
Mark A. Lemley, Durie Tangri LLP
Bryan P. Clark, The Webb Law Firm

Dated: September 2, 2016

/s/ *Daniel H. Brean*
Counsel for Defendants-Appellants Newegg, Inc. Newegg.com, Inc., and Rosewill, Inc.

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ARGUMENT

AdjustaCam brought a case against Newegg no reasonable person could have thought it could win. It persisted with that case even after a *Markman* ruling made it clear that there was no infringement, and even after the Patent and Trademark Office had said its patent was invalid on the very grounds Newegg asserted in court. AdjustaCam did this because its business model did not involve trying to win, but instead trying to coerce nuisance-value settlements from defendants who would rather pay a small round figure than spend far more in legal fees to win the case. That business model was profitable for it. But Newegg wouldn't pay, and so AdjustaCam dropped the case rather than lose it.

In the first appeal of the fees issue, this Court found Newegg's claim for fees to have "significant merit." *AdjustaCam, LLC v. Newegg Inc.*, 626 Fed. Appx. 987, 991 n.2 (Fed. Cir. 2015). It vacated the district court's decision not to award fees and remanded for a determination of the totality of the circumstances, including both the merits and AdjustaCam's business behavior, under the new *Octane* standard. Rather than engage in that determination, Judge Gilstrap on remand chose to simply reaffirm Judge Davis's original, vacated ruling, and indeed criticized this Court for having the temerity to essay an opinion on the merits.

The district court's claim construction and AdjustaCam's own admissions easily confirm the baselessness of AdjustaCam's case and the district court's clear error on remand. AdjustaCam does not deny that the "rotatably attached" components of the claimed camera clip are each limited to rotation about a single axis. AdjustaCam also does not deny that the corresponding components of the accused products that are allegedly "rotatably attached" can rotate about multiple axes. On this record it was, and remains, clear error for the district court to twice bless AdjustaCam's infringement theory as reasonable. Further, the evidence of AdjustaCam's business model of seeking nuisance-value settlements without regard to the merits of the case is also overwhelming.

Instead of defending the case as it was litigated, AdjustaCam in this appeal relies on new arguments and evidence that it never advanced until the case was on remand, and only after this court found that Newegg's position "appear[ed] to have significant merit." *AdjustaCam*, 626 Fed. Appx. at 991 n.2. A supplemental declaration offered by AdjustaCam to backfill its infringement case with new arguments cannot justify AdjustaCam's frivolous arguments made while the case was active.

AdjustaCam's new arguments are also wrong, and fundamentally mischaracterize the infringement issues. Newegg never argued that the '343 Patent's camera cannot pan and tilt, but only argued that *how* it pans and tilts matters and is strictly limited by the claim language, as construed. Newegg's view of the claims encompasses the preferred embodiment, is fully consistent with how

Newegg asserted prior art against those claims, and plainly excludes the accused ball-and-socket products.

For AdjustaCam to insist that Judge Davis's findings were correct and contend that Newegg is prohibited from arguing the facts, while at the same time presenting many pages of entirely new evidence and argument, further highlights that the case was indeed objectively baseless and AdjustaCam knows it. Newegg should not have had to pay its own fees to defend such abusive patent assertions.

I. NEWEGG HAS NOT WAIVED ANY ARGUMENT THAT JUDGE DAVIS'S PRIOR FACTUAL FINDINGS WERE CLEARLY ERRONEOUS

AdjustaCam argues that Newegg somehow "waived" the ability to argue the facts of this case. Adj. Br. at 20. But AdjustaCam's cited case law does not support its contention. That law indicates, at most, that issues not raised on appeal are waived for purposes of remand and subsequent appeal. *Id.* Here, contrary to AdjustaCam's assertion, Newegg challenged each and every factual finding in its first appeal on the basis of clear error, and did so again on remand. *See, e.g.*, Appx3832 (Newegg's prior appeal brief arguing that Judge Davis "misapprehended the evidence and the parties' contentions," constituting reversible clear error); *see also* Appx3833; Appx3845-Appx3846; Appx3848; Appx3727-Appx3735. Following the district court's second round of factual findings (which merely adopted the prior factual findings), Newegg is free to continue challenging those erroneous determinations.

Nor was the remand of this case as limited as AdjustaCam contends. The remand "for reconsideration" under *Octane* required a fresh view and re-weighing of the facts and evidence. The case was not only remanded but the original decision was vacated. *AdjustaCam*, 626 Fed. Appx. at 991. A new evaluation of the facts is appropriate in such a case. *See Site Update Solutions, LLC v. Accor N. Am., Inc.*, No. 5:11-cv-03306-PSG, 2015 U.S. Dist. LEXIS 17603, at *3 (N.D. Cal. Feb. 11, 2015) (explaining that "[a]fter *Octane*, the Federal Circuit vacated the court's decision and remanded for another look under the new standard," and proceeding to make fresh findings relating to alleged misconduct).

Finally, AdjustaCam's theory that the factual record was closed in the first appeal cannot be squared with its own insistence on introducing new evidence on remand. AdjustaCam's plea that Newegg waived arguments should be rejected.

II. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT ADJUSTACAM'S INFRINGEMENT POSITION WAS REASONABLE

A. Newegg's Accused Products Plainly Fail to Meet the Claims' "Rotatably Attached" Requirements

The district court on remand incorrectly found that AdjustaCam's infringement claims had merit. This is clear error. As explained in Newegg's opening brief, the claims of the '343 Patent cover a camera clip defined in terms of the way in which three components—a camera, a hinge member, and a support frame—are connected to one another. Newegg Br. at 9-11. The camera is "rotatably attached" to the hinge member so that the camera can rotate "about a first axis of rotation, relative to the hinge member" and the hinge member is "rotatably attached" to the supporting frame so that the hinge member can rotate "about a second axis of rotation, relative to said support frame." '343 Patent, Claim 1; Newegg Br. at 11.

During *Markman*, the district court held that "'rotatably attached' objects in the patent-in-suit are limited to a single axis of rotation." Appx0022-Appx0023. Thus, as construed, the claims require that both: (1) the camera is rotatably attached to the hinge member such that the camera can rotate about only a single axis of rotation relative to the hinge member; and (2) the hinge member is rotatably attached to the support frame such that the hinge member can rotate about only a single axis of rotation relative to the support frame.

AdjustaCam accused Newegg products (the "Accused Ball-and-Socket Products") that include a camera connected to a support via a ball-and-socket joint. Newegg Br. at 11-15; *see also* Appx1755-Appx1775, Appx1786. This ball-and-socket connection allows the camera to rotate about multiple axes within the socket rather than just a single axis. *Id.* In particular, the camera can twist along a first axis (to impart a panning motion) by rotating the ball within the socket and the camera can tilt along a second axis by pivoting the stem about the socket.

Socket
Stem
Ball and Socket with
Multiple Axes of Rotation
Ball

Ball
Socket
Hercules

Appx1786; *see also* Appx1755-Appx1775.

The Accused Ball-and-Socket Products do not employ the claimed configuration in which the camera is rotatably attached to an intermediate hinge member, which is then rotatably attached to a support frame, where each rotatable attachment is limited to a single axis of rotation. Thus, the Accused Ball-and-Socket Products cannot meet the rotatably attached limitations of the claims as construed by the district court. *See* Appx0022. AdjustaCam's insistence to the contrary was baseless, especially after the district court's *Markman* Order. Indeed, AdjustaCam acknowledges that a camera clip which permits the camera to rotate in multiple directions about its point of connection with a hinge member had no place in the case following claim construction. *See* Adj. Br. at 8 ("[d]ue to the Court's construction of 'rotatably attached,' AdjustaCam dropped sixteen (16) webcams from the suit because the rotatable attachment between the hinge member and camera was not limited to a single axis of rotation.").

AdjustaCam argues that because the Accused Ball-and-Socket Products can pan and tilt, they infringe. This is not so. To infringe the claims as construed, no one "rotatably attached" object can rotate about more than one axis relative to the object to which it is "rotatably attached." It is not enough that a camera can pan and tilt relative to *some* object in the claims. The Accused Ball-and-Socket Products, while they may be characterized as being able to pan and tilt, do so by rotating about more than one axis. Thus, it was objectively baseless that AdjustaCam ever accused these products of infringement.

This result does not somehow change because the accused products include a "constrained ball and socket joint" rather than an unconstrained one. The only constraint placed on the ball-and-socket joint of the accused products is that the camera rotates freely only in two axes of rotation (spin and forward-backward tilt) and rotation is limited in the third axis (side-to-side tilt). AdjustaCam's own expert admitted as much. Appx0485-Appx0487 (AdjustaCam's expert explaining that "[t]his happens to be a constrained ball–and-socket joint. So it can [1] spin about the axis, it can [2] move forward, it may be able to [3] move to the side.").

Judge Davis originally ruled that "AdjustaCam's infringement theories are not objectively baseless" because the range restriction of just one axis out of three "could meet the claim limitation which requires the hinge member being rotatably attached to the camera in a single axis of rotation." Appx0006. This was clearly erroneous. There is no dispute that the accused cameras rotate about at least two if not three axes. And despite instructions from this Court to reconsider the evidence on remand, Judge Gilstrap adopted Judge Davis's findings without any discussion about the merits of the infringement issue. *See* Appx0001-5-Appx0001_6; Newegg Br. at 26-27.

With no explanation of his reasoning, neither the parties nor this Court can confirm how Judge Gilstrap even reached the conclusions that Judge Davis's findings were correct. AdjustaCam merely relies on Judge Gilstrap's conclusory statements that he "considered the totality of the circumstances" and conducted a "careful review of the entirety of the record." Adj. Br. at 61-62. That cannot suffice as the full evaluation of the facts this Court required on remand. Nothing in Judge Gilstrap's opinion explains why AdjustaCam's infringement case had merit. Judge Gilstrap merely deferred to Judge Davis. That was improper. Judge Davis's now-vacated opinion was clearly erroneous because it was an erroneous understanding of the facts and law. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014); *AdjustaCam*, 626 Fed. Appx. at 991 n.2.

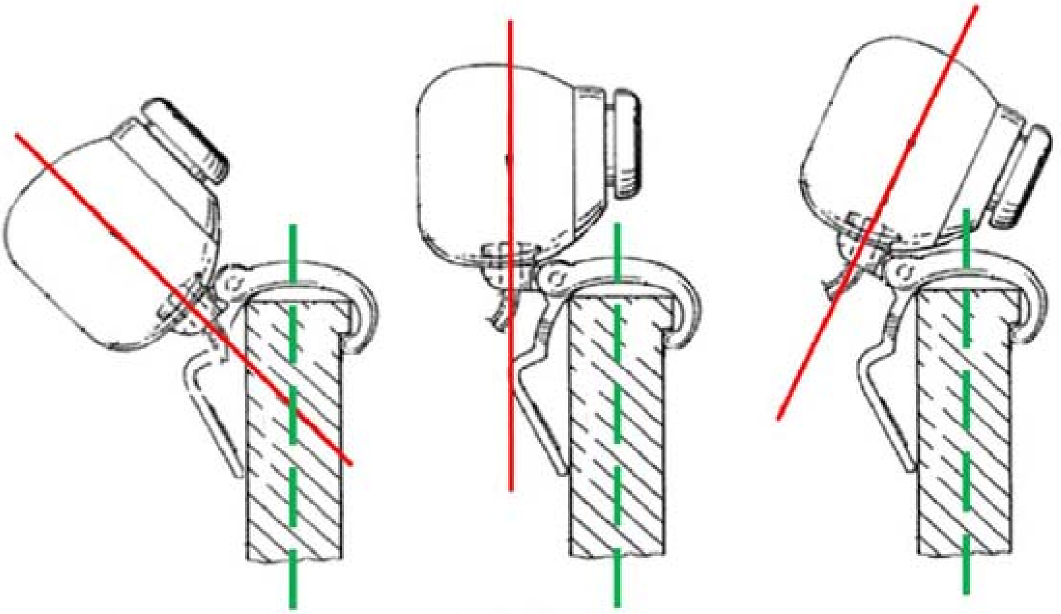
Judge Gilstrap's refusal to consider the merits of the case anew rather than defer to Judge Davis's vacated opinion was erroneous for another reason. While Judge Gilstrap referred to Judge Davis's greater familiarity with the merits, there was never a merits ruling in this case before AdjustaCam dismissed its claims. In cases like this that are dismissed prior to a merits determination, it is even more important that district courts examine the merits in considering the fees motion and explain why a patentee's infringement position is or is not plausible. Otherwise, a patentee's misconduct in asserting frivolous claims cannot be brought to light. Judge Gilstrap did not do what this Court ordered--independently evaluate the "significant merit" in Newegg's position. Any independent evaluation could only conclude that AdjustaCam's infringement case was hopeless.

B. AdjustaCam Fundamentally Misrepresents the Nature of the Infringement Dispute

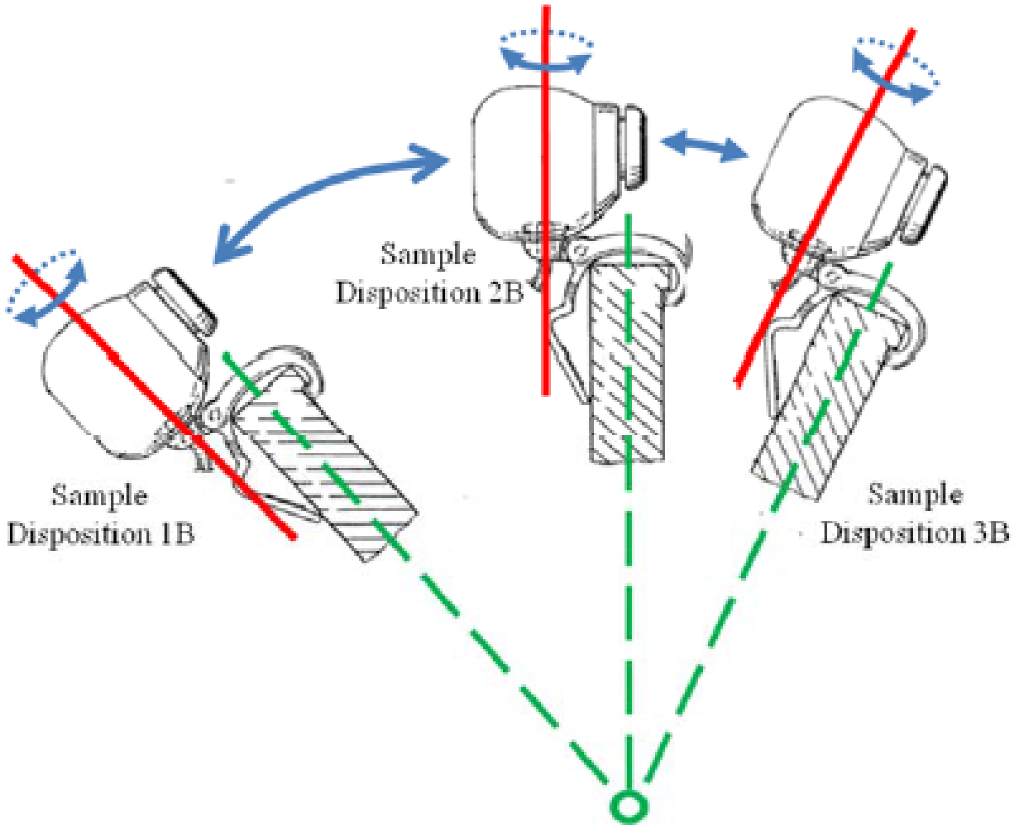
Rather than address head-on Newegg's explanation as to why AdjustaCam's infringement position was baseless, AdjustaCam opts for a strategy of misdirection by mischaracterizing the infringement dispute and Newegg's positions. *See generally* Adj. Br. at 21-34. For example, AdjustaCam asserts that Newegg's position on the "limited to a single axis of rotation" construction is that the claimed camera clip has a camera "limited to a single axis of rotation at all times and in all configurations." Adj. Br. at 22. AdjustaCam also accuses Newegg of injecting an additional restriction in which the camera has a single, fixed "orientation" or "tilt." *Id*. at 22-23; *see also id*. at 30-32 (suggesting that Newegg's reading would result in a camera having an "immovable" tilt axis). This reading, AdjustaCam asserts, would exclude the preferred embodiment of the '343 Patent, which "is capable of being rotated on axial rotation at a variety of axial tilts." Adj. Br. at 24-25. AdjustaCam then devotes a dozen pages to tearing down this straw man through a puzzling discussion of "axial spin" and "axial tilt," terms which appear nowhere in the '343 Patent, the district court's *Markman* Order, the parties' briefing to Judge Davis, or even the briefing to this Court during the first appeal.

AdjustaCam cites to nothing in the record to support this new characterization of Newegg's position because Newegg has never suggested the claims should be so restricted. It is, and always has been, Newegg's position that the claims expressly allow for (and require) two axes of rotation: a first axis about which the camera rotates relative to the hinge member and a second axis, perpendicular to the first, about which the hinge member rotates relative to the support frame. *See, e.g.,* Newegg Br. at 10 ("The clip allows for rotation in two distinct directions about distinct axes of rotation described as the 'first axis' and 'second axis.'"); ("[f]irst, … the camera can be rotated to pan side-to-side. … [s]econd, . . . the camera (via the hinge member) can be tilted upward and downward."). Because the claims expressly call out both first and second axes of rotation, the only reasonable interpretation is that there are at least two axes of rotation. *See* '343 Patent, claim 1. It is disingenuous for AdjustaCam to now accuse Newegg of taking the unsupportable position that the claims do not permit the camera to both pan and tilt when Newegg has characterized the claims as allowing for both of these functions, *provided they are each enabled by a separate, single-axis rotatable connection*. *See* Newegg Br. at 10.

In any event, these new arguments about “axial tilt” and “axial spin” are flat wrong. For example, AdjustaCam contends that the “only difference[s]” between the following sample dispositions of Figures A and B is “the difference in the angular orientation of each disposition’s axis in space.” Adj. Br. at 30, 32.



Sample Disposition 1A   Sample Disposition 2A   Sample Disposition 3A


Sample
Disposition 2B
Sample
Disposition 1B
Sample
Disposition 3B

Adj. Br. at 29, 31.

While the "twisting" axis of camera rotation for each disposition tilts progressively from left to right in each of Figures A and B, the reason for this is paramount. As AdjustaCam admits, in Figure A it is because the hinge rotates, while in Figure B it is because the entire camera clip rotates. Adj. Br. at 32. That both Figures A and B result in the same tilted camera orientations does not mean that limiting each axis of rotation to a single axis would somehow exclude the preferred embodiment of the '343 Patent, as AdjustaCam argues. Adj. Br. at 32-33.

Whether one chooses to then tilt the camera by rotating the hinge (per Figure A) or the entire clip (per Figure B) is beside the point. Neither way results in a twisting axis that is "affixed and immovable" or outside the scope of the claims. Adj. Br. at 32. The camera clip depicted in Figures A and B includes a hinge member that is "rotatably attached" such that it *can* rotate "about a second axis of rotation, relative to said support frame," as claimed, even if that allowable movement is not employed to tilt the camera. Newegg Br. at 11.

AdjustaCam also incorrectly asserts that "[i]f limited to Newegg's misinterpretation of 'rotatably attached,' the preferred embodiment would itself be excluded by the patent in which it is described." Adj. Br. at 28. But the position actually advanced by Newegg—that the claims recite two rotatable connections, each of which is limited to a single axis of rotation—is squarely in line with the "preferred embodiment." Newegg Br. at 9-11. Indeed, it is the ***only*** interpretation that is consistent with the language of the patent, as the district court correctly found in its *Markman* order. AdjustaCam's lengthy strawman arguments should be rejected.

C. AdjustaCam's Reliance on *Post Hoc* Arguments is Improper and Indicative of the Weakness in its Case

AdjustaCam introduced new arguments and evidence to Judge Gilstrap on remand that had not been before Judge Davis. Not only was this improper, but, remarkably, AdjustaCam now argues on appeal that it would be "inappropriate" for the parties to reargue the facts on remand because "[i]t was appropriate for Judge Gilstrap to agree with Judge Davis's assessment of the facts," all while defending the merits of its case almost entirely through new arguments and evidence that were never even seen by Judge Davis. Adj. Br. at 20-21, 63. In particular, AdjustaCam's lengthy new arguments about "axial rotation" and "axial tilt" were only made after this Court observed that Newegg's position "appear[ed] to have significant merit" and remanded to the district court for further consideration in view of *Octane*. *AdjustaCam*, 626 Fed. Appx. at 991 n.2. And while AdjustaCam states that its current infringement position "is recited in detail in the Report and Declaration of its expert Dr. Muskivitch," Adj. Br. at 22, AdjustaCam conveniently neglects to mention that this *supplemental* declaration, which looks nothing like Dr. Muskivitch's original declaration or AdjustaCam's prior arguments defending against Newegg's motion,[1] was executed January 7, 2016—after this Court's remand, and nearly two and a half years after Judge Davis made his factual findings on infringement that were readopted by Judge Gilstrap on remand. Appx3785, Appx3937, Appx3975, Appx0153, Appx0004-Appx0011. AdjustaCam admitted during oral argument on remand that it submitted the new declaration specifically to "supplement[] [the] record" with arguments and explanations that were never previously before the court. Appx4312-Appx4313 (AdjustaCam contending that "the record just wasn't that well developed" at the time of Newegg's original fee motion). In the 18 pages of AdjustaCam's brief that purport to explain why Newegg's non-infringement position "lacks factual or technical merit," AdjustaCam cites to this new expert declaration over 50 times. *See* Adj. Br. at 21-38. AdjustaCam does not cite to the original Muskivitch report a single time. *Id*.

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[1] *See* Appx1253-Appx1260 (excerpt of original Muskivitch report).

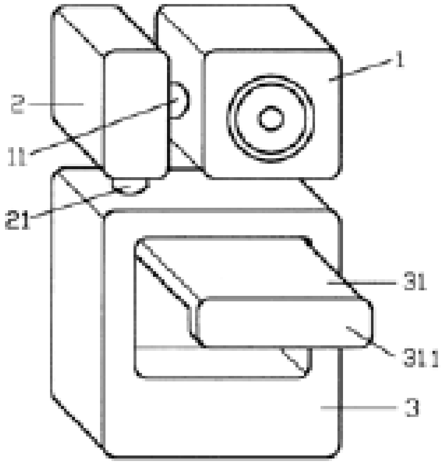
AdjustaCam's new arguments and declaration did not appear to influence Judge Gilstrap. *See* Appx4326 (Judge Gilstrap, in response to Newegg's objection to AdjustaCam's "new evidence," stating that he did not intend to "disturb the existing record"); Appx0001_1-Appx0001_7 (Judge Gilstrap not mentioning or citing to supplemental declaration). Nor should it influence this Court. AdjustaCam's belated attempt to backfill its infringement case does strongly suggest that AdjustaCam recognized, at least as early as when this Court observed that Newegg's position "appear[s] to have significant merit," that the weakness of its case had been exposed. Otherwise, there would have been no need for AdjustaCam to develop entirely new arguments to defend its infringement theory.

Regardless of AdjustaCam's motive, it would be improper to consider these late-developed theories as proof of the reasonableness of AdjustaCam's actions during the "case" that Newegg contends was "exceptional" under Section 285. *See Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 (2016) (*post hoc* rationalization and after-the-fact defenses are not relevant to assessing reasonableness of a party's subjective beliefs and positions during the relevant time period). Whether "a party's litigating position … or the unreasonable manner in which the case was litigated" stands out under *Octane* should not be measured by a party articulating what they *wish* they had argued when the case was pending. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

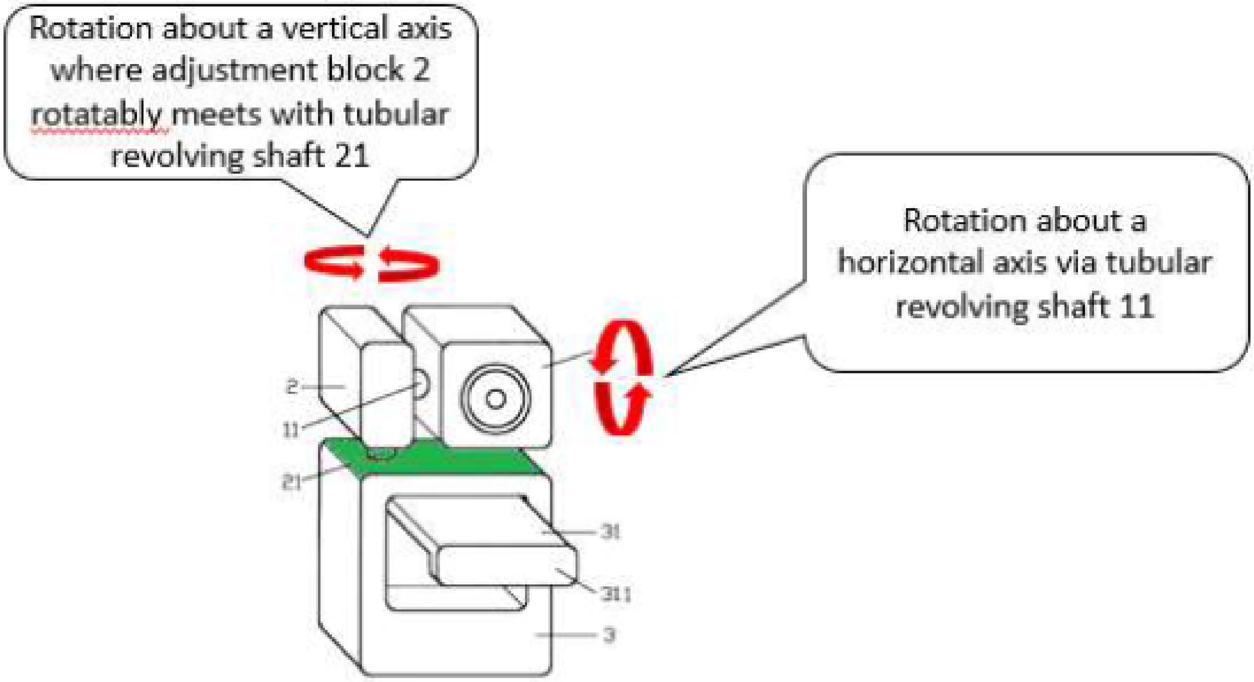
D. Newegg's Invalidity Positions Are Fully Consistent With its Non-Infringement Positions

AdjustaCam contends that Newegg's assertion of the Ma patent to invalidate the '343 Patent is inconsistent with Newegg's non-infringement position, which somehow proves AdjustaCam's infringement theory has merit. Adj. Br. at 38-40. AdjustaCam is wrong on both counts.

Newegg's prior art theories do not create any inconsistencies. AdjustaCam argues that the camera in the Ma patent rotates about two different axes relative to the hinge member like the Accused Ball-and-Socket Products, undermining Newegg's argument that the axes of rotation must be limited and distinct. *Id.* But the Ma patent, unlike a ball-and-socket configuration, does not allow the camera to rotate in two axes with respect to the hinge. Rather, like the '343 patent, the Ma patent's device involves a camera (1), a hinge member (2), and a support frame (3):

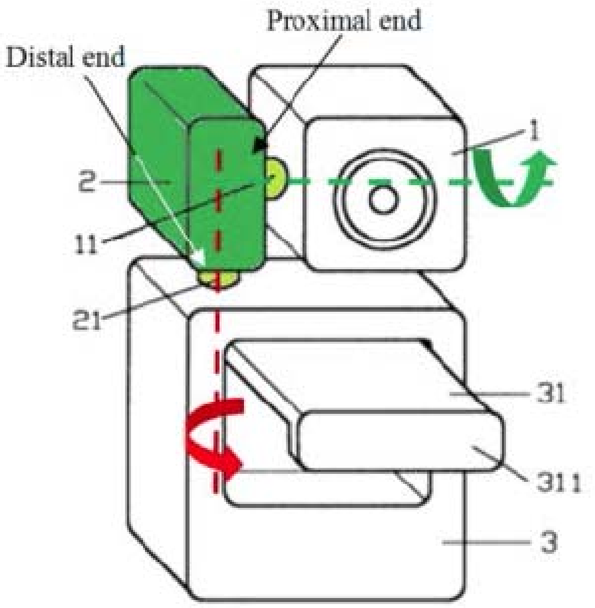

1
2
11
21
31
311
3

AdjustaCam's expert admitted in his following annotations that the Ma camera rotates about a shaft (11) along a horizontal axis relative to the hinge member (2), and the hinge member (2) in turn rotates about another shaft (21) about a vertical axis:


Rotation about a vertical axis where adjustment block 2 rotatably meets with tubular revolving shaft 21
Rotation about a horizontal axis via tubular revolving shaft 11
2
11
21
31
311
3

Adj. Br. at 39 (citing AdjustaCam's expert report at Appx3966).

The Ma camera is thus just like the preferred embodiment in AdjustaCam's patent, in that both the camera and the hinge member are limited to a single axis of rotation relative to the hinge member and support frame, respectively, but their combined rotations allow for both panning and tilting of the camera relative to the support frame. Newegg very clearly showed the district court how the Ma patent (as annotated below) matched up to the claimed camera clip of the '343 Patent:



Appx1792 (arguing that "the Ma Patent discloses a camera (1) rotatably attached to a hinge member (2), a support frame (3), and the claimed first and second axes of rotation"). This was also the view expressed by Newegg's invalidity expert in his report served on AdjustaCam well before the case was dismissed. *See* Appx1265-Appx1267 (AdjustaCam's expert quoting and responding to Dr. Klopp's report addressing the Ma patent); *see also* Appx0939 (USPTO adopting this understanding of Ma patent in reexamination). Newegg's invalidity position with respect to the Ma patent is fully consistent with its view on non-infringement.

Nor did Newegg's assertion of the Dovey patent as prior art undermine Newegg's non-infringement position. Adj. Br. at 40-42. In so arguing, AdjustaCam misrepresents Newegg's position on the Dovey patent. Newegg did not point to the bayonet mount in Dovey as the hinge by which the camera rotates. Rather, Newegg pointed to the camera's attached mounting tube (42), which rotates relative to the mounting means (22) about a vertical axis, the mounting means (22) in turn tilting forward and backward about the support frame (10, 16):

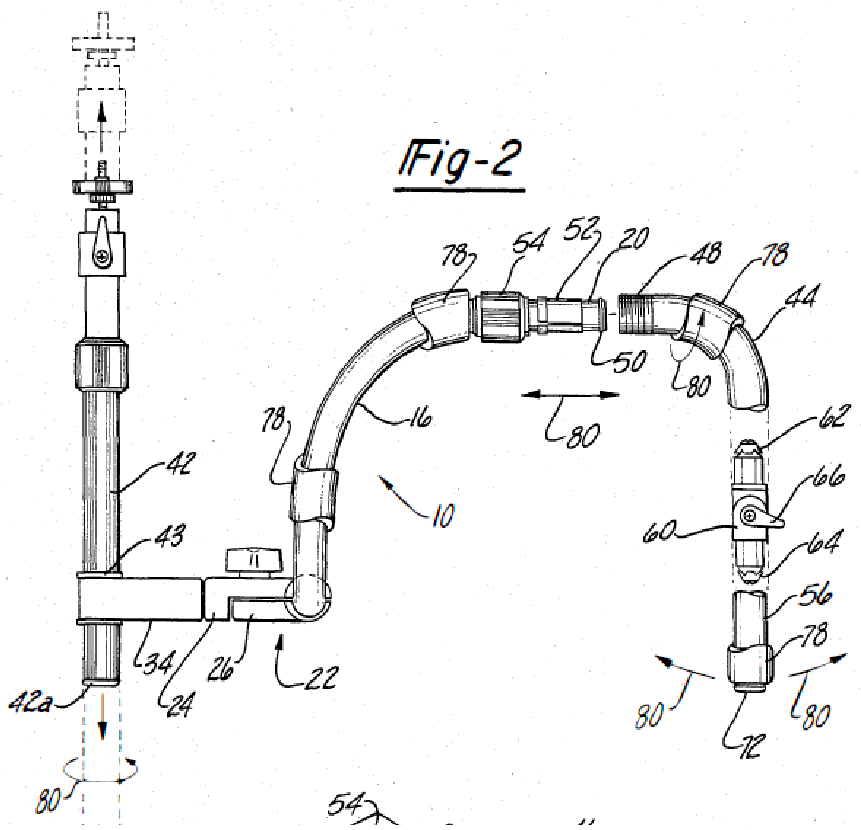


Fig-2
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Appx4244-Appx4245 (Newegg's expert explaining Dovey); *see also* Appx4232-Appx4234; Appx4236, at 3:8-11 ("the mounting tube 42 has a longitudinal axis perpendicular to the aforementioned two axes and the mounting may be rotated a full 360°."); Appx4235-Appx4236, at 2:67-3:4 ("Thus loosening the first thumb wheel 28 permits rotation of the mounting means through 360° circle relative to the longitudinal axis of the tube 16.").

As with the Ma patent, these components of the Dovey device neatly match up with the single-axis-of-rotation claims of the '343 Patent, and fundamentally differ from the Accused Ball-and-Socket Products. Newegg's positions on non-infringement and invalidity are fully consistent, and both are correct.

III. ADJUSTACAM'S VALIDITY ARGUMENTS WERE NOT REASONABLE

AdjustaCam also tries to support its baseless opposition to Newegg's invalidity case, contending that "Irifune lacks a 'rotatable attachment' because the camera either has to be screwed tightly down, in which case it is not rotatable, or it has to be loosely appended via an unthreaded hole, in which case it is not attached." Adj. Br. at 50. That is simply not true. A partially screwed down camera is both "attached" and "rotatable"—it is "rotatably attached" to the mounting device under the plain language of the claims and under AdjustaCam's own proposed construction ("[c]onnected such that the connected object is capable of being rotated"). Appx0020. Anybody who has ever screwed a bottle cap onto a bottle knows that even a partially closed bottle still has its cap both connected to the bottle and rotatable. Yet, in AdjustaCam's view, the camera in Irifune is not connected to its hinge member unless it is screwed down tightly such that it could not rotate. Adj. Br. at 46. These arguments were frivolous, and especially so in the post-*KSR* landscape where "common sense" prevails. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

Another version of AdjustaCam's refrain about fixed "axial tilt" from its belated infringement arguments also appears in AdjustaCam's brief regarding

Irifune. *See* Adj. Br. at 27-28, 44. To try to distinguish Irifune from the ’343 Patent, AdjustaCam deems the camera’s panning position in Irifune fixed whenever the camera is “attached” to the hinge. *Id.* But as AdjustaCam’s expert’s annotations admit, panning and tilting of the camera in Irifune may be accomplished just like the ’343 Patent—by two separate, single axis rotation movements—a “rotation about a vertical axis when shaft 9 is not tightened down” and a “hinged rotation about a horizontal axis when camera fixed part 2 rotates about central shaft 1.” Adj. Br. at 27-28.

Finally, the fact that certain claims added in the reexamination were deemed patentable over Irifune (Adj. Br. at 47-48), or the fact that AdjustaCam would now like to distinguish Irifune on other grounds than it did in the underlying case (Adj. Br. at 48-49), says nothing about AdjustaCam’s frivolous arguments made in the district court as to this central “rotatably attached” aspect of the litigated claims. The only argument from AdjustaCam’s expert that AdjustaCam relied on in defending against Newegg’s original fee motion was AdjustaCam’s expert’s argument concerning the “rotatably attached” limitation. *See* Appx1205-Appx1206; Appx1263. Whether the “substantive strength of [AdjustaCam’s] litigating position[s]” on Irifune “stand out” under *Octane* turns exclusively on the exceptional weakness of AdjustaCam’s argument that the camera in Irifune is not “rotatably attached.” 134 S. Ct. at 1756.

IV. THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT ADJUSTACAM DID NOT ACT IN BAD FAITH

A. AdjustaCam's Settlement History Confirms its Nuisance-Value Litigation Strategy

AdjustaCam goes to great lengths to try to explain how its litigation strategy was not premised on extracting nuisance-value settlements from as many defendants as possible. Adj. Br. at 53-59. However, the facts say otherwise.

Nearly every one of the dozens of defendants sued by AdjustaCam settled for lump-sum amounts well under the cost to defend oneself against the infringement allegations. Newegg Br. at 17-18; Appx1282 (AdjustaCam settlement agreement summary); Appx1283-Appx1285. Indeed, by the time AdjustaCam dismissed Newegg in 2012, AdjustaCam had settled with eleven defendants for [[[redacted]]] or less, three defendants for amounts between [[[redacted]]] and [[[redacted]]], four defendants for amounts between [[[redacted]]] and [[[redacted]]], and two defendants for amounts greater than [[[redacted]]]. Appx1282.

AdjustaCam posits that these low, round number settlements were not the result of a nuisance-value settlement campaign, but rather were "directly related to [AdjustaCam's] target royalty of $1.25-$1.50 per webcam … [that] was established many years before this suit." Adj. Br. at 53. But, despite the existence of more than 20 settlements entered into during this litigation, AdjustaCam is unable to point to a single license it executed that even arguably reflects that target rate—the effective royalty rates were all over the map, and few were anywhere close to the alleged "target." *See* Appx1283-Appx1284 (showing widely scattered rates from [[[redacted]]]/unit to [[[redacted]]]/unit); Newegg Br. at 18.[2] And while AdjustaCam lauds the existence of six settlement agreements which included both a lump sum component and a running royalty component in an amount within the target royalty range, Adj. Br. at 55, AdjustaCam's expert admitted that the running royalty component in these agreements was illusory. *See* Newegg Br. at 21-22; *see also* Appx1313-Appx1314 (AdjustaCam's expert admitting that none of the six licensees ever reached the maximum number of sales and had to pay a running royalty). In reality, the parties to those six agreements, like every other settling defendant, paid lump-sum nuisance values (between [[[redacted]]] and [[[redacted]]]) to settle with AdjustaCam. *Id.*

AdjustaCam's reliance on the PAR/Logitech/Phillips licenses is also misplaced. These agreements were not entered into by AdjustaCam and say nothing about AdjustaCam's intent in its own licenses. In any event, those agreements still do not reflect the target. *See* Newegg Br. at 19, 43.

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[2] AdjustaCam quibbles over the effective royalty rate calculations provided by Newegg's expert. Adj. Br. at 55-56. Even if some adjustments should be made to Dr. Sullivan's calculations along the lines that AdjustaCam suggests, AdjustaCam provides no reason to think that such adjustments would come close to correcting for the orders-of-magnitude disparity between the alleged target royalty and the effective royalty rates. In fact, all of AdjustaCam's criticisms of the calculations suggest that the number of products subject to the royalty was calculated as being too high. If the calculations were redone using a smaller number of royalty-bearing products, it would only increase the effective royalty per unit and skew almost all the figures even further away from AdjustaCam's alleged target royalty. *See* Appx1283-Appx1284.

If proof of a target licensing rate existed in AdjustaCam's negotiations, or proof existed that the rates paid by AdjustaCam's licensees reflected anything other than the desire to avoid protracted litigation, that proof of good faith would have been "easy to provide." *See Kilopass Tech. Inc. v. Sidense Corp.*, 738 F.3d 1302, 1311 (Fed. Cir. 2013). Indeed, given that the settlements of record are nearly all lump sum payments of round numbers and do not indicate that AdjustaCam was even aware of the licensee's sales figures, it would certainly behoove AdjustaCam to have provided such evidence if it existed. However, despite Newegg's challenge on this point both before and after remand, AdjustaCam has offered little more than unsubstantiated claims that it was seeking a pre-established target royalty.[3]

B. AdjustaCam Did Not Pursue Newegg in Good Faith

AdjustaCam's decision to dismiss Newegg after two years of litigation and shortly before summary judgment is indicative of AdjustaCam's total lack of interest in the merits of this case. Newegg Br. at 45-46. In its opposition brief, AdjustaCam contends that its conduct with respect to Newegg was always in good faith. AdjustaCam claims that it "acted reasonably" by dropping sixteen accused webcams from the lawsuit following the district court's *Markman* ruling. Adj. Br. at 8. AdjustaCam also argues that it dismissed Newegg from the lawsuit for entirely prudent reasons—because Newegg's upstream suppliers of accused products became licensed, making Newegg's potential exposure "*de minimis*," it supposedly no longer made economic sense to pursue Newegg. *Id.* at 8-10.

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[3] Notably, AdjustaCam blames the lack of evidence concerning what AdjustaCam knew during settlement negotiations on Newegg's alleged choice "not to depose the AdjustaCam representative who was actually involved in the negotiations." Adj. Br. at 18. Yet, when it is AdjustaCam's turn to support its claim that it "used this $1.25 - $1.50 per webcam royalty rate as a baseline for licensing the various defendants," it cites to Steve Wong, the very person who was deposed by Newegg. *See* Adj. Br. at 55 (citing "corporate deposition" and portions of its expert report that refer to "Interview of Steve Wong").

First, the fact that AdjustaCam brought sixteen additional infringement allegations that it admits were meritless does nothing to render its other remaining contentions somehow more meritorious. To accuse ball-and-socket products of infringing the '343 Patent was baseless given the plain language of the patent claims, in which the patented camera is limited to rotation about distinct axes. *See supra*. Even if there was some reasonable doubt about this clear claim requirement, which there is not, the *Markman* order conclusively established that a ball-and-socket configuration was outside the scope of the claims of the '343 Patent. Yet AdjustaCam continued pressing those baseless claims even after the *Markman* order. Ultimately, AdjustaCam's decision to drop sixteen webcams from the case following *Markman* was an empty gesture because it did not eliminate Newegg's obligation to defend itself, not did it impact AdjustaCam's ability to apply settlement pressure with regard to the remaining webcams.

Second, if AdjustaCam's motivation to dismiss Newegg was strictly based on Newegg's minimal exposure, as AdjustaCam contends, then one would have expected AdjustaCam to dismiss Newegg promptly after it learned of Newegg's small exposure. AdjustaCam was anything but prompt in moving to dismiss Newegg, however. Here, Newegg's sales of less than $100,000 of the accused products were confirmed to AdjustaCam no later than November 2011. Newegg Br. at 22-23, 46; Appx1784; Appx1226; Appx1362-Appx1363.[4] This reflected the total accused sales before the February 2012 *Markman* hearing and subsequent *Markman* order that allegedly prompted AdjustaCam to drop sixteen accused webcams from the lawsuit. *Id.* Yet it took AdjustaCam more than nine months, until August 27, 2012, to finally conclude that Newegg's minimal sales volume did not justify protracted litigation. Appx2141 (AdjustaCam's motion to dismiss Newegg). The district court's April 10, 2012 *Markman* order that supposedly caused AdjustaCam to jettison the majority of its infringement accusations, reducing Newegg's potential exposure even further, was still more than six months

[4] AdjustaCam contends without any citation or explanation that this confirmation of accused sales finds no support in the record and is "false." AdjustaCam Br. at 9 n.10. To the contrary, the portions of the record cited above and in Newegg's opening brief show that these sales figures were "produced to AdjustaCam pursuant to the Court's order following status conference on February 7, 2011." Appx1226, Appx1362-Appx1363.

before AdjustaCam filed its motion to dismiss Newegg. Appx0026. Meanwhile, AdjustaCam made nuisance settlement demands unreflective of Newegg's actual exposure in the litigation. Newegg Br. at 22-23.

In truth, AdjustaCam was never interested in the actual amounts at stake or a per-unit royalty. AdjustaCam dismissed Newegg simply because it saw that Newegg would not pay a nuisance settlement payment, and that Newegg was determined to vindicate its legal positions in the litigation. Newegg Br. at 45-46. Again, proof to the contrary, if it existed, would be "easy to provide." *Kilopass*, 738 F.3d at 1311.

This conduct—seeking a payment based on the cost of litigation and unrelated to the merits of the patent claim—has the "'indicia of extortion'" this Court has previously found sufficient to support an award of fees even under the stricter pre-*Octane* standard. *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1326 (Fed. Cir. 2011). As the Court explained in *Eon-Net* in awarding fees on the basis of a very similar nuisance-value settlement strategy:

> Viewed against Eon–Net's $25,000 to $75,000 settlement offer range, it becomes apparent why the vast majority of those that Eon–Net accused of infringement chose to settle early in the litigation rather than expend the resources required to demonstrate to a court that the asserted patents are limited to processing information that originates from a hard copy document. Thus, those low settlement offers—less than ten percent of the cost that Flagstar expended to defend suit—effectively ensured that Eon–Net's baseless infringement allegations remained unexposed, allowing Eon–Net to continue to collect additional nuisance value settlements.

Id. at 1327. *Eon-Net* found this conduct to be baseless and engaged in bad faith under the tougher *Brooks Furniture* standard. It is surely "exceptional" under *Octane*.

AdjustaCam relies on *SFA Sys., LLC v. Newegg Inc.*, 793 F.3d 1344 (Fed. Cir. 2015) to suggest that this case lacks evidence of "nefarious business models." Adj. Br. at 4. However, *SFA Systems* supports a finding that this case is exceptional. In *SFA Systems*, the Federal Circuit held that "a pattern of litigation abuses characterized by the repeated filing of patent infringement actions for the sole purpose of forcing settlements, with no intention of testing the merits of one's claims, is relevant to a district court's exceptional case determination under § 285." 793 F.3d at 1350. That pattern is AdjustaCam's business model. While the licenses in *SFA Systems* were not all deemed nuisance value, the same cannot be said here, where AdjustaCam's settlements are almost all modest, round-number [[[redacted]]] lump sums. 793 F.3d at 1351 (noting that the record included "larger settlements imply[ing] that SFA does not always seek nuisance value settlements"); Newegg Br. at 17-18 (detailing AdjustaCam's settlement history).

Furthermore, AdjustaCam demanded early nuisance-value settlements of $75,000 and $65,000 from Newegg that were never tied to the merits of the case, or even to AdjustaCam's own damages theory in the case. Newegg Br. at 22-23, 43. After serving an expert report calculating damages of $17,928, AdjustaCam still sought nearly three times that amount from Newegg to settle the case—a figure that AdjustaCam's own expert agreed was unreasonable. *Id*. at 43. AdjustaCam's only explanation for this overreaching demand is to say that the settlement payment would "necessarily" include both past and future infringement. Adj. Br. at 60.

AdjustaCam points to nothing showing how much expected future sales were projected for Newegg, or any indication that Newegg even wanted to continue selling the accused products instead of switching to alternative products. As with the executed settlement licenses, AdjustaCam simply cannot back up its demands to Newegg with any hard facts or figures to show a credible connection between the dollar amounts and the alleged target royalty. This is because the demands, like the executed settlements, were calculated as nuisance-value given the high cost of litigation defense.

C. AdjustaCam is not the Victim of an Alleged "Crusade" by Newegg to Recover Fees

AdjustaCam casts aspersions at Newegg only to distract from its own bad faith. *See* Adj. Br. at 3-4. The facts simply do not support AdjustaCam's overblown rhetoric painting Newegg as an unreasonable anti-patent crusader. Newegg may be principled in its views about patent litigation, but Newegg cannot be faulted for exercising its right to aggressively defend itself against meritless claims, and to seek fees when it believes a miscarriage of justice has occurred.

According to AdjustaCam, Newegg is on a "crusade to prevail under § 285" and will pursue "overaggressive efforts to recover fees" regardless of "whether an appeal [on § 285] is even merited." *Id*. But the fact is that Newegg has elected to settle litigation or not seek fees in the vast majority of its patent cases, including those brought by other non-practicing entities, even though Newegg did not believe that it infringed any valid claims. Sometimes Newegg elected not to seek fees even after it prevailed in court. *See, e.g.*, *Soverain Software, LLC v. Newegg Inc.*, 705 F.3d 1333 (Fed. Cir. 2013) (claims held invalid on appeal; Newegg did not seek fees); *Alcatel-Lucent USA, Inc. v. Newegg Inc.*, 505 Fed. Appx. 957 (Fed. Cir. 2013) (complete defense verdict at trial summarily affirmed on appeal; Newegg did not seek fees); *Digitech Image Techs., LLC v. Electronics for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014) (summary judgment of invalidity affirmed on appeal; Newegg did not seek fees); *Kelora Systems LLC v. Newegg Inc.*, No. 4:11-cv-1548, 2012 U.S. Dist. LEXIS 70636 (N.D. Cal. May 21, 2012), aff'd 500 Fed. Appx. 953 (Fed. Cir. 2013) (summary judgment of invalidity affirmed on appeal; Newegg did not seek fees); *Speedtrack, Inc. v. Newegg Inc.*, No. 4:07-cv-03602-PJH (N.D. Cal. July 12, 2007) (Newegg prevailed but did not seek fees); *Data Carriers, LLC v. Newegg Inc.*, No. 1:12-cv-00942-LPS (D. Del. July 19, 2012) (Data Carriers, like AdjustaCam, unilaterally dismissed Newegg but Newegg did not seek fees); *Stambler v. Newegg Inc.*, No. 2:09-cv-00310-JRG

(E.D. Tex. Oct. 7, 2009) (Newegg settled); *21 SRL v. Newegg Inc.*, No. 2:09-cv-06590 (N.D. Il. Oct. 20, 2009) (Newegg settled).

Further, the charge that Newegg is pursuing meritless fees appeals rings particularly false in this case. This Court has already reviewed this case once and determined that Newegg's fees motion had "significant merit." *AdjustaCam*, 626 Fed. Appx. at 991 n.2.

Newegg has been and will continue to be reasonable and selective in defending cases and seeking fees. AdjustaCam's suggestion to the contrary is simply unwarranted.

V. THERE IS NO NEED FOR A REMAND IN THIS CASE

There is no need for a remand in this case to determine exceptionality because the facts unambiguously demonstrate that this is an "exceptional" case under Section 285. AdjustaCam advanced obviously incorrect arguments, maintained those arguments even after losing on claim construction, and conducted the entire case with an eye towards nuisance-value litigation cost settlements rather than any genuine effort to prevail on the merits. This was exceptional conduct, warranting fees under Section 285. The district court twice found to the contrary, committing clear error. This Court should reverse and order the district court to grant Newegg's attorneys' fees under the *Octane* standard.

A remand would be inappropriate in this case because this Court has already afforded the district court an opportunity to review the facts anew under the correct legal standard, and the district court chose not to avail itself of that opportunity. Appx0001_5-Appx0001_6. While Judge Gilstrap's opinion on remand paid lip service to assessing the totality of the circumstances anew, it is evident that he did no such thing. *Id.* Rather, Judge Gilstrap chose to defer to the conclusions originally reached by Judge Davis, despite the facts that (1) this Court vacated those conclusions, (2) they were made using an erroneous legal standard, (3) Judge Davis was in no better position to assess the facts, because AdjustaCam abandoned its case before a ruling on the merits or even complete summary judgment briefing, and (4) this Court had already reviewed the record and found "significant merit" in Newegg's fees motion. Rather than dig into the facts, the district court on remand rotely readopted old, vacated findings. *Id.* It even went so far as to criticize this Court for having the temerity to inquire into the merits itself, treating any reevaluation of Judge Davis's original, flawed findings as somehow inappropriate despite this Court's obligation to correct such clear error. Appx0001_6 n.6. Given Judge Gilstrap's unwillingness to engage with the merits on remand when instructed to do so, outright reversal rather than yet another remand is the appropriate remedy.

CONCLUSION

The judgment of the district court should be reversed, this case should be declared exceptional, and the case should be remanded to the district court to order payment by AdjustaCam of the attorneys' fees and expert fees owed to Newegg.

Respectfully submitted,

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/s/ *Daniel H. Brean*

Kent E. Baldauf, Jr.
Daniel H. Brean
Bryan P. Clark
THE WEBB LAW FIRM
One Gateway Center
420 Fort Duquesne Blvd.
Suite 1200
Pittsburgh, PA 15222
Telephone: (412) 471-8815

Mark A. Lemley
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: (415) 362-6666

Richard G. Frenkel
LATHAM & WATKINS LLP
140 Scott Drive
Menlo Park, CA 94025
Telephone: (650) 463-3080

Counsel for Defendants-Appellants Newegg, Inc. Newegg.com, Inc., and Rosewill, Inc.

CERTIFICATE OF SERVICE

This is to certify that on September 2, 2016, copies of the foregoing Reply Brief of Defendants-Appellants was served on counsel for AdjustaCam, LLC via the Court's ECF system and via electronic mail upon the following:

John J. Edmonds (jedmonds@ip-lit.com)
Stephen F. Schlather (sschlather@ip-lit.com)
Shea N. Palavan (spalavan@ip-lit.com)
COLLINS, EDMONDS, POGORZELSKI, SCHLATHER & TOWER PLLC
1616 South Voss Road
Houston, TX 77057

/s/ *Daniel H. Brean*
Counsel for Defendants-Appellants
Newegg, Inc. Newegg.com, Inc., and
Rosewill, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the body of this brief, beginning with the Argument on page 1, and ending with the last line of the conclusion on page 34, including headings, footnotes, and quotations, is written in Times New Roman, size 14-point font, and contains 6,985 words, in compliance with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii).

/s/ *Daniel H. Brean*
Counsel for Defendants-Appellants
Newegg, Inc. Newegg.com, Inc., and
Rosewill, Inc.